STATE OF MICHIGAN

COURT OF APPEALS

DAVID AND MARY KUZNER, Plaintiffs/Counter-Defendants/Appellants,	UNPUBLISHED May 27, 2014
v	No. 315079 Alcona Circuit Court
KEVIN C. PRZYBYLA, MARGARET ANN PRZYBYLA, ALFRED E. DAVIS, and LINDA A. DAVIS, Defendants/Counter-Plaintiffs/Appellees.	LC No. 12-1872-CH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the December 19, 2012 order of the trial court granting defendants summary disposition and dismissing plaintiffs' claim. Plaintiffs, as counter-defendants, also appeal as of right from the February 7, 2013 order of the trial court, entered after a bench trial, deciding defendants' counterclaim and ordering that plaintiffs pay defendants $1,279.11 for utility and insurance bills and pay delinquent property taxes for the tax years 2011 and 2012, as well as ordering that when plaintiffs sell their interest in the subject property, they are to remit to defendants any value received over one-third the appraised value of the land, because plaintiffs "are not entitled to receive any benefit based upon the increase in value of the property as a result of the construction of the lodge." We affirm the December 19, 2012 order, but vacate the February 7, 2013 order in part and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case relates to a hunting camp and the property on which it is located. In or around 1992, defendant Kevin Przybyla purchased an 80-acre parcel of marsh land, upon which he hunted deer with defendant Alfred Davis. Sometime in 1994 or 1995, Przybyla and plaintiff David Kuzner jointly purchased a 100-acre parcel across the road from the original parcel. In

[1] The wives of the parties are also signatories to the buy-sell agreement, but did not actively participate in the hunting lodge or this litigation.

1995, Przybyla and Kuzner invited Davis to become a one-third owner of the combined property; the parties divided the original purchase costs of both parcels and made adjustments so that each had invested one-third of the total purchase price.

The parties executed a "Buy-Sell Agreement" (Agreement) in August of 1995. Davis's attorney prepared the document.

The Agreement provides in relevant part:

> The parties agree that their third (1/3) interest in this parcel will be sold in the manner prescribed herein. This agreement shall apply to their heirs and assigns. The parties will hold title as tenants in common, and shall hereafter be referred to as owners. The parties shall contribute equally to the cost of these parcels.
>
> If an owner wishes to sell his interest, or should pass away, the remaining owners shall have the right of first refusal to buy his interest. Valuation shall be based on an SRA appraisal pro-rated for the one-third interest and current property tax pro-rations. The paperwork cost shall be split equally among the parties. Terms shall be negotiated at the time of sale. If terms cannot be negotiated, then the parties stipulate to allow an arbiter to set the terms of sale. The arbiter shall be chosen by the majority of owners and a representative of the deceased owner's estate.
>
> If an owner wants to sell or assign his interest after a refusal to buy from the other owners, the new purchaser shall be approved by the remaining owners.

In 1998, Davis approached the other two owners about building a pole barn on the property, at his expense, to store his personal recreational equipment. Davis testified that he received a call from Kuzner about adding living quarters to the barn, and that at some point between September of 1999 and 2002, Kuzner produced a plan for the interior of a lodge that would have living space upstairs and storage space downstairs.

Construction began on the building. Davis advanced the initial amounts needed for the construction, and Przybyla and Kuzner each paid Davis a one-third share of those costs.[2] Thereafter, Przybyla and Davis performed the majority of the labor to finish the inside of the building. Defendants estimated that Kuzner's unpaid share of the cost of completing the interior,

[2] Although defendants have argued, in both their brief and at oral argument, that it was unclear whether sums paid by Kuzner were reimbursement for the purchase price, improvements to roadways, or payments for the construction of the exterior building, Davis testified specifically that he was repaid a one-third share of the construction cost from both Przybyla and Kuzner. Davis also testified that the three men had agreed to each contribute $2,500 dollars towards improving trails on the property. No evidence presented at trial supports the notion that Kuzner still owed any part of the purchase price of either of the parcels.

apart from labor performed by defendants, was $14,769.62. Przybyla and Davis testified that Kuzner acknowledged that he owed this amount in 2006 and again in 2009, but Kuzner denied it.

At some point, Kuzner became interested in selling plaintiffs' share of the property. Kuzner used the property about once a year in 2008 and 2009. In 2009, plaintiffs filed a complaint for partition. The trial court granted summary disposition to defendants, finding that the Agreement precluded partition. No appeal was taken from that order.

Plaintiffs then brought the instant case, seeking to compel arbitration and require defendants to buy Kuzner's share of the property. Defendants answered and filed a counterclaim, seeking a money judgment against plaintiffs for the $14,769.62 in materials costs, one-third of the market value of the labor provided by defendants in constructing the hunting camp, and alleged unpaid shares of property taxes, utility bills, and insurance premiums. Defendants moved for summary disposition on plaintiffs' claim.

After the hearing on defendants' motion, the trial court granted summary disposition to defendants. The trial court found that the Agreement contained a right of first refusal and did not mandatorily compel defendants to purchase Kuzner's share. Further, the court found that plaintiffs had not complied with the terms of the right of first refusal, and that defendants had not exercised it. The court therefore dismissed plaintiffs' claim.

Following the grant of summary disposition to defendants, a bench trial was held on defendants' counterclaim. Davis testified that defendants were seeking $20,000 from plaintiffs as reimbursement for the cost of labor done by himself and Przybyla, as well as the other expenses listed in their counterclaim. The trial court held that construction and labor costs were not an "expense" under the Agreement and that the parties had never agreed to divide these costs.[3] However, the trial court also held that plaintiff could not profit from the improved value of the property from the addition of the hunting camp.

The trial court issued an order following the bench trial, which stated in relevant part:

> THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED as follows:
>
> A. Counter-Defendants shall pay to Counter-Plaintiffs the sum of $1,279.11 representing one-third of the Consumer's Energy bills and insurance bills paid by Counter-Plaintiffs.
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> B. Counter-Defendants shall promptly pay the taxes due on premises [sic] for the tax years 2011 (which are delinquent) and 2012 (part of which are delinquent) and any penalties thereon.

[3] The Agreement provided that "[a]ll expenses regarding said land shall be shared equally . . . ."

C. When Counter-Defendants sell their interest in the property, they shall be entitled to one-third (1/3) of the value of the land only based on an appraisal of the land. Any such sale proceeds exceeding the one-third (1/3) value of the land, as determined by said appraisal, shall be paid over to Counter-Plaintiffs.

Plaintiffs appeal both rulings of the trial court.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Bd of Trustees of Policemen & Firemen Retirement Sys v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

We review issues of contract interpretation de novo. *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 627; 839 NW2d 693 (2013).

B. ANALYSIS

Defendants argued before the trial court that the Agreement clearly provided for a right of first refusal, and did not require them to purchase the property. They further argued that the right of first refusal could only be exercised, or not, in the context of a specified price, and that they had not exercised their right of first refusal. Finally, defendants argued that the arbitration provision in the Agreement did not allow for an arbitrator to set the price of a sale pursuant to an exercise of the right of first refusal, but instead only allowed the arbitrator to set other terms of a sale (if the parties could not agree upon them) in the event that defendants had exercised their right of first refusal so as to agree to purchase the property at a specified price.

Plaintiffs responded that defendants exercised their right of first refusal under the Agreement, indicating to plaintiffs that they wished to buy the property. Plaintiffs stated that they thereafter obtained an appraisal of the property, at which point defendants declined to purchase the property at the appraised price. Plaintiffs contend that, under the Agreement, the appraisal sets the price of the property, and an arbitrator may require defendants to purchase the

property for one-third of the appraised value and to set such other terms as installment payments to which the parties are unable to agree.

The pertinent language of the Agreement reads:

> If an owner wishes to sell his interest, or should pass away, the remaining owners shall have the right of first refusal to buy his interest. Valuation shall be based on an SRA appraisal pro-rated for the one-third interest and current property tax pro-rations. The paperwork cost shall be split equally among the parties. Terms shall be negotiated at the time of sale. If terms cannot be negotiated, then the parties stipulate to allow an arbiter to set the terms of sale.

In interpreting this provision, it is clear that the Agreement provides that if an owner wishes to sell his interest in the property, the other owners have the right to purchase that interest ahead of any sale of that interest to a third party. Price is to be based on an appraisal, and if necessary, terms are to be decided by an arbitrator. The dispute here initially centers on whether the right of first refusal can (or must) be exercised (or not) in the abstract or whether, alternatively, it is to be exercised (or not) in the context of a specified price. Further, it requires us to consider the parties' respective compliance with the contract terms. Finally, we will consider whether the Agreement compels an owner to purchase the interest of another owner at a specified price, and whether the Agreement permits an arbitrator to establish the sale price.

"Right of first refusal" is a term of art in the buying and selling of property. See *Randolph v Reisig*, 272 Mich App 331, 336; 727 NW2d 388 (2006). "[T]he usual rule of contract interpretation is that technical terms and words of art are given their technical meaning when used in a transaction within their technical field." *Rory v Continental Ins Co*, 473 Mich 457, 517; 703 NW2d 23 (2005) (quotation marks and citation omitted).

"A right of first refusal, or preemptive right, is a conditional option to purchase dependent on the landowner's desire to sell." *Randolph*, 272 Mich App at 331. A right of first refusal commonly allows the holder of that right the opportunity to match any bona fide offer to purchase made to the seller of property. See *In re Smith Trust*, 274 Mich App 283, 287-288; 731 NW2d 810 (2007). A right of first refusal may also allow the holder of the right to purchase the property at a specific price in the event that the property holder desires to sell. See, e.g., *Ackerman Elec Supply Co v Koukious*, 16 Mich App 527, 530-531; 168 NW2d 433 (1969).

A right of first refusal compels the owner of property to "offer it first to the party who has the first right to buy." *Smith Trust*, 274 Mich App at 287-288, quoting 17 CJS, Contracts, § 56, p 503. Further, when the seller receives an offer to purchase from a third party, he must notify the holders of the right of first refusal; at that point, the right of first refusal "transmutes" into an option to purchase the property for that price. An option is an absolute right to purchase at a certain price within a certain time frame. See *id*. at 288.

With awareness of the meaning of the phrase "right of first refusal," we agree with the trial court that a right of first refusal cannot, and need not, be exercised (or not) in the abstract. Rather, a right of first refusal can only be properly evaluated in the context of a specified price. As owners desirous of selling their property interest, plaintiffs therefore could not require

defendants, under the right of first refusal provision of the Agreement, to evaluate an offer to sell plaintiffs' property interest without first specifying the price associated with that offer.

Consequently, any expression of interest by defendants, in response to plaintiffs' initial offer to sell, did not constitute an exercise of defendants' right of first refusal under the Agreement, because there was as yet no price specified in conjunction with that offer. The trial court thus correctly determined that defendants had not yet exercised their right of first refusal, because "when [the right of first refusal] kicks in is when they have a number."

Plaintiffs contend that "We did get an appraisal. [Defendants] never then said they didn't want to purchase it. They just didn't want to pay the price of the – as it was appraised." However, assuming that to be true, and assuming further that the appraisal satisfied the requirements of the Agreement, defendants' refusal to purchase at the appraisal price does not constitute a breach of any agreement to purchase, for the reasons noted. Instead, it would merely constitute a determination by defendants, in response to plaintiffs' then-proper offer to sell in conjunction with a specified price, not to exercise their right of first refusal under the Agreement. In that event, the parties would be free to exercise their rights under the next provision of the Agreement, which reads: "If an owner wants to sell or assign his interest after a refusal to buy from the other owners, the new purchaser shall be approved by the remaining owners." Defendants conceded at the summary disposition hearing that this language means that plaintiffs "ha[ve] the right to sell [their] property for anything [they] can get for it. [Defendants] have refused to purchase it."

That said, we make note of an issue on which neither the parties (except at oral argument) nor the trial court has appeared to focus. Specifically, the Agreement provides that the valuation of a property interest to be evaluated under the right of refusal provision of the Agreement "shall be based on an SRA appraisal," with appropriate pro-rations and adjustments. The record does not reflect whether the appraised value that was the subject of defendants' refusal to purchase constituted "an SRA appraisal" within the meaning of the Agreement. The appraisal in question reflects that it was prepared by "Julie A. Mathewson," a "Certified Residential Appraiser." In an Addendum, it sets forth the qualifications of the appraiser, which do not reference an "SRA" designation.[4] It thus appears that plaintiff may not have complied with the contractual requirement that an offer to sell, such as would trigger defendants' right of first refusal, be valued based on an SRA appraisal. Although defendants apparently rejected plaintiffs' offer to sell based on the Mathewson appraisal, this would leave open the possibility, should the parties choose to pursue it, of a subsequent offer to sell based on an SRA appraisal, and of an evaluation of that offer by defendants under their contractual right of first refusal.

Finally, we agree with the trial court that the Agreement does not require defendants to purchase plaintiffs' interest, and that the Agreement does not provide for an arbitrator to determine a sales price. Plaintiffs' argument is premised on an interpretation of the right of first

[4] While not part of the record below, it appears that SRA is a designation issued by The Appraisal Institute, and that less than 1% of appraisers have achieved the SRA Designation. See http://americanappraisals.com/sra_explained.htm. (Last visited April 17, 2014).

refusal provision so as to irrevocably commit defendants to purchase plaintiffs' property interest at an appraisal price that had not yet been determined, an interpretation that we reject for the reasons noted. Plaintiffs' position is not supported by the language of the Agreement or the law regarding rights of first refusal. Had the parties sought to compel the remaining owners to purchase a selling owner's share of the property at a particular price, the Agreement could have been drafted that way. This Court will not rewrite the express terms of contracts. See *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199; 747 NW2d 811 (2008). We therefore decline to rewrite the Agreement to require defendants to commit to exercising their right of first refusal, or not, regarding plaintiffs' interest, prior to the establishment of a selling price.

The trial court correctly held that the language of the Agreement did not compel defendants to purchase plaintiffs' interest in the property. Accordingly, it did not err in finding no genuine issue of material fact that defendants were entitled to judgment as a matter of law on their complaint to compel arbitration of the terms under which defendants would be required to purchase that interest.[5] *West*, 469 Mich at 183.[6] We affirm the trial court's order of December 19, 2012.

III. DEFENDANTS' COUNTERCLAIM

Regarding defendants' counterclaim, plaintiffs argue that the trial court erred in declaring that plaintiffs would receive only one-third the value of the land upon sale of their interest in the property, and would not be able to profit from any increase in value caused by the addition of the building to the property.[7] This Court considers a trial court's equitable decision de novo on

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[5] We note that the Agreement does not provide the arbitrator with the authority to determine the sale price. To the contrary, the Agreement provides that a valuation, in connection with the exercise of a right of first refusal, is to be "based on an SRA appraisal." An arbitrator is limited to determining other "terms" of a sale, in the event that the parties are unable to agree on them.

[6] We note that the parties have raised res judicata and judicial estoppel arguments related to the 2009 partition case. The trial court in the 2009 action merely held that "an agreement between the parties relating to the rights and duties of a cotenant who desires to sell his/her interest in the property exists and it bars an action for partition." The prior action did not interpret the Agreement or resolve issues present in the instant case. "Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the maintenance of the two actions are identical." *Labor Council, Michigan Fraternal Order of Police v Detroit*, 207 Mich App 606, 607; 525 NW2d 509 (1994). The doctrine is not applicable to the instant case. Further, as to the parties' arguments concerning their stances on arbitration taken in the previous case, these arguments are irrelevant in light of our affirmance of the trial court's interpretation of the Agreement; moreover, judicial estoppel is an "extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice" and is not applicable to the instant case. *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999).

[7] Plaintiffs do not challenge the portion of the trial court's order ordering plaintiffs to pay a portion of the utility bills, insurance premiums, and property taxes on the subject property.

appeal. See *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010). Equitable remedies are based on principles of natural justice and arise from the equity court's "broad and flexible jurisdiction . . . to afford remedial relief, where justice and good conscience so dictate." *Id*., quoting 30A CJS, Equity, § 93, at 289.

The trial court ruled that plaintiffs did not have to pay any further amounts towards the finishing of the building's interior, but could not realize any benefit from the addition of the structure upon the sale of plaintiffs' interest. The trial court based this decision in its observation of the common law rule that a cotenant of a tenancy in common is not obligated to pay for improvements to property made without his consent by other cotenants. See *Martin v O'Conner*, 37 Mich 440, 440 (1877); *Eighmey v Thayer*, 135 Mich 682, 687; 98 NW 734 (1904); see also 86 CJS, Tenancy in Common, § 92, p 319 ("It is the generally accepted rule that a cotenant who, without the consent or agreement of the other cotenants, places improvements on the common property may not compel the tenants to contribute.").

We find no error in the trial court's determination that plaintiffs did not owe any additional amounts to defendants for improvements to the building. Kuzner testified that his plans for the building did not include "Corian counters," electric heat, a kitchen, or other amenities that were added to the building. He further stated:

> The concept that we agreed upon we were going to build a structure so Al [Davis] could store his—whatever he had planned on storing. And then to make use of the space as a place for us to hunt from. It wasn't to build a taj mahal. I didn't have that kind of dream for our hunting camp. They ended up with that kind of dream.

Davis admitted that Kuzner indicated in 2003 or 2004 that he no longer wished to be a co-owner. Improvements on the inside of the building began in summer of 2003. Although Przybyla testified that Kuzner wanted "back in" in 2005, Kuzner denied this claim. Kuzner testified that he listed plaintiffs' property interest for sale sometime between 2005 and 2007. It was undisputed that Kuzner used the property only sparsely from 2002 through 2009.

The evidence at trial thus supports the trial court's conclusion that Kuzner (and his wife) never agreed to the improvements to the building made by defendants. Thus, as cotenants who had not given their consent or agreement to the improvements, plaintiffs could not be held liable for their cost. *O'Conner*, 37 Mich at 440 (1877); *Eighmey*, 135 Mich at 687.

However, the trial court went further, and ordered that, should plaintiffs successfully sell their share to a third party, and realize a profit over and above the increased value of the land without the building, then plaintiffs must remit the excess profit to defendants. Neither party requested this relief or briefed the issue.

With respect to the trial court (which, perhaps, anticipated future problems between the parties and attempted to proactively address them) we hold that the issue of any unjust enrichment on behalf of plaintiffs from a hypothetical sale of their interest was unripe and not suitable for judicial review. "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's*

Constitution v Secretary of State, 280 Mich App 273, 282; 761 NW2d 210 (2008). Generally, ripeness is addressed in the context of a party's claim. See *id*. However, in the instant case, the trial court essentially sua sponte raised an issue on behalf of defendants: what happens if plaintiffs get more money for their share because of the improvements for which they had not paid? For this issue to become ripe, numerous contingent future events would have to occur. Defendants would have to refuse a properly-made offer to purchase plaintiffs' share and thereby so exercise their right of first refusal. Plaintiffs would have to find a third-party purchaser and negotiate a sale price. That sale price would have to reflect an increase in value of the share over and above what could be attributed to the improved value of the land itself.[8]

Such contingent future events may not occur. Plaintiffs and defendants may reach an amicable resolution of their differences. Plaintiffs may sell their interest in the property but realize no profit. Plaintiffs may reconsider their desire to sell and resume use of the property. In short, the trial court's order represents the sort of "adjudication of hypothetical or contingent claims before an actual injury has been sustained" that the doctrine of ripeness is designed to prevent. *City of Huntington Woods v Detroit*, 279 Mich App 603, 615; 761 NW2d 127 (2008) (quotation marks and citation omitted). Such concerns are especially relevant here, where no party actually claimed an injury, asserted a defense, or otherwise had the opportunity to present argument on this issue. Should plaintiffs sell their interest in the property and realize a profit that defendants deem unjust, defendants may take appropriate action at that time in the usual manner. We accordingly vacate the trial court's order of February 7, 2013 to the extent that it orders plaintiffs to remit any future profits realized from the sale of their interest in the property, and affirm the order in all other respects.

With respect to the trial court's December 19, 2012 order, we affirm. With respect to the February 7, 2013 order, we affirm in part and vacate in part as described above, and remand for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

[8] We note that defendants admitted that Kuzner reimbursed Davis for one-third of the funds paid to the contractor for the construction of the exterior building. See also note 2, *supra*. The trial court's order would deny plaintiffs any profit realized from the presence of the unadorned pole barn. While an unadorned two-level pole barn may not possess as much value as a luxurious hunting lodge, neither does it possess no added value to the land. Should the issue of the extent to which plaintiffs may profit from the sale of their share arise, the trial court should consider that a cotenant who pays a share of the cost of an improvement is entitled to a "corresponding share" of the value added to the land. *Eighmey*, 135 Mich at 687.